# Citta Sdn Bhd v Puncak Niaga (M) Sdn Bhd

HIGH COURT (SHAH ALAM) — NO 22NCVC-103–01 OF 2012
NURCHAYA ARSHAD J
15 JUNE 2012

*Civil Procedure — Striking out — Action — Claim for refund of deposit — Whether action against defendant should be struck out — Counterclaim — Whether counterclaim disclosed reasonable cause of action — Whether should be struck out*

By way of a letter of offer the defendant had agreed to rent premises at Lot No G-13A G-15, Citta Mall, Ara Damansara to the plaintiff. The purpose of the tenancy was to be strictly to set up a fast food restaurant under the Albaik concept. After having paid the deposit of RM38,336 to the defendant, the plaintiff was unable to proceed with the Albaik concept as it was unable to secure a franchise licence from the master franchisor in the Middle East. It therefore proposed a new Malay dining concept. However, the defendant subsequently informed the plaintiff that it could not proceed with either the Albaik concept or the newly proposed Malay dining concept. Instead the defendant proposed other restaurant concepts and also the plaintiff's relocation to other lots of Citta Mall. The plaintiff did not agree with the relocation plan. The plaintiff however managed to secure the Albaik licence and wished to proceed with its initial plan of operating a fast food restaurant under the Albaik concept. The defendant informed the plaintiff that the premises allocated to it were no longer available and thus proposed that the plaintiff's restaurant be relocated. The plaintiff withdrew from the tenancy and demanded a refund of the deposit paid. The defendant failed to refund the deposit by relying on the letter of offer, which it claimed provided it the right to forfeit the deposit in the event the plaintiff withdrew from the tenancy. Although the defendant finally agreed to refund the deposit to the plaintiff, the latter returned the money to the defendant and commenced legal action against the defendant claiming for a refund of the deposit with interest, general damages and loss of profit. The defendant counterclaimed that the plaintiff's claim was prejudicial and amounted to malicious prosecution. Thereafter the defendant proceeded by way of the present application to strike out the plaintiff's claim, while the plaintiff applied to strike out the defendant's counterclaim.

**Held**, striking out the plaintiff's claim and the defendant's counterclaim with costs:

(1) Clause 25 of the letter of offer, which justified the defendant's right to

relocate the demised premises, also provided that the plaintiff would be entitled to a refund of the deposit when it exercised its right to decline the relocated demised premises. Therefore, the plaintiff had every right to demand for the refund and the defendant's initial refusal to refund the deposit was clearly inconsistent with the letter of offer. Further, since the tenant's trade in the letter of offer provided strictly for a fast food restaurant under the Albaik concept only, it was unfair on the part of the defendant to later disapprove the said concept after the plaintiff had worked hard to secure the licence from the Middle East (see paras 11–13).

(2) Be that as it may, the matter should be put to an end when the defendant refunded the deposit. As such, the plaintiff's claim should be struck out with costs of RM2,000. However, it was ordered that the deposit be refunded to the plaintiff with interest (see paras 14–15).

(3) There was no reasonable cause for the defendant's counterclaim. Therefore, the counterclaim should be struck out with costs of RM2,000 (see paras 17–18).

**[Bahasa Malaysia summary**

Melalui surat tawaran defendan telah bersetuju untuk menyewakan premis-premis di Lot No G-13A G-15, Citta Mall, Ara Damansara kepada plaintif. Tujuan penyewaan adalah dengan tegas untuk membuka restoran makanan segera di bawah konsep Albaik. Selepas membayar deposit sebanyak RM38,336 kepada defendan, plaintif tidak dapat meneruskan dengan konsep Albaik kerana ia gagal untuk mendapatkan lesen francais daripada pemilik francais di Timur Tengah. Ia dengan itu mencadangkan konsep bersantap Melayu yang baru. Defendan walau bagaimanapun kemudiannya memberitahu plaintif yang ia tidak dapat meneruskan sama ada dengan konsep Albaik atau konsep bersantap Melayu yang baru dicadangkan. Defendan sebaliknya mencadangkan konsep restoran lain dan juga penempatan semula plaintif ke lot-lot yang lain di Citta Mall. Plaintif tidak bersetuju dengan plean penempatan semula tersebut. Plaintif, walau bagaimanapun berjaya mendapatkan lesen Albaik dan berharap untuk meneruskan dengan pelan pertama dengan menjalankan restoran makanan segera di bawah konsep Albaik. Defendan memberitahu plaintif bahawa premis-premis yang diberikan kepadanya tidak lagi tersedia ada dan oleh itu mencadangkan bahawa restoran plaintif ditempatkan semula. Plaintif menarik balik daripada penyewaan dan menuntut bayaran balik deposit yang dibayar. Defendan gagal untuk membayar balik deposit dengan bergantung kepada surat tawaran, yang mana ia mendakwa memberikannya hak untuk melucuthak deposit jika plaintif menarik balik daripada penyewaan. Walaupun defendan akhirnya bersetuju untuk membayar balik deposit kepada plaintif, plaintif memulangkan semula wang kepada defendan dan memulakan tindakan undang-undang terhadap defendan dengan menuntut bayaran balik deposit dengan faedah, ganti rugi

am dan kerugian keuntungan. Defendan menuntut balas bahawa tuntutan plaintif adalah menjejaskan dan merupakan pendakwaan berniat jahat. Kemudiannya defendan meneruskan melalui permohonan ini untuk membatalkan tuntutan plaintif, sementara plaintif memohon untuk membatalkan tuntutan balas defendan.

**Diputuskan**, membatalkan tuntutan plaintif dan tuntutan balas defendan dengan kos:

(1) Klausa 25 surat tawaran, yang menjustifikasikan hak defendan untuk menempatkan semula premis tersebut, juga memperuntukkan bahawa plaintif akan berhak kepada bayaran balik deposit apabila ia menjalankan haknya untuk menolak penempatan semula premis tersebut. Plaintif oleh itu mempunyai hak untuk menuntut bayaran balik dan penolakan permulaan defendan untuk membayar balik deposit jelas tidak konsisten dengan surat tawaran. Selanjutnya, memandangkan perniagaan penyewa di dalam surat memperuntukkan secara tegas untuk restoran makanan segera hanya di bawah konsep Albaik, adalah tidak adil bagi pihak defendan untuk kemudiannya tidak meluluskan konsep tersebut selepas plaintif telah bekerja keras untuk mendapatkan lesen tersebut daripada Timur Tengah (lihat perenggan 11–13).

(2) Oleh itu, perkara tersebut patut diselesaikan apabila defendan membayar balik deposit tersebut. Oleh itu, tuntutan plaintif patut dibatalkan dengan kos sebanyak RM2,000. Walau bagaimanapun, ia diperintahkan bahawa deposit dibayar kepada plaintif dengan faedah (lihat perenggan 14–15).

(3) Tidak terdapat kausa munasabah untuk tuntutan balas defendan. Oleh itu tuntutan balas patut dibatalkan dengan kos sebanyak RM2,000 (lihat perenggan 17–18).]

**Notes**

For cases on action, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7428–7473.

**Cases referred to**

*Dato' Seri Anwar bin Ibrahim v Perdana Menteri Malaysia & Anor* [2010] 3 MLJ 174; [2010] 5 CLJ 369, FC (refd)

**Legislation referred to**

Rules of the High Court 1980 O 18, O18 r 19(1)(a)

*Norshamsinar Mohamad (Ely Azura with her) (Rozali Ismail & Co) for the plaintiff.*

*KY Lee (CJ Siew and Ester Yap with him) (Dauglass Yee & Partners) for the defendant.*

**Nurchaya Arshad J:**

FACT

**[1]** The plaintiff has been offered to rent premises at Lot No G-13A & G-15, Citta Mall, Ara Damansara. The plaintiff had paid deposit RM38,336 on 30 July 2010 to the defendant. According to Part 14 of Schedule A of the letter of offer, the tenant's trade shall be strictly for a fast food restaurant under Albaik concept. However, the plaintiff had on 13 December 2010 informed the defendant that the plaintiff was not able to proceed with Albaik as it was unable to secure a franchise license from the master franchisor in the Middle East. The plaintiff proposed a new concept ie *makanan sedap*. However, the defendant had through letters dated 22 December 2010 and 3 January 2010 informed the plaintiff that it could not approve the new concept on the said lots and proposed that *makanan sedap* be relocated to other lots in Citta Mall.

**[2]** The defendant subsequently informed the plaintiff that the defendant could not approved either the concept Albaik dining or Malay dining (under Restaurant Makanan Sedap). The defendant encouraged the plaintiff to view and study plan B and canoodling, both new restaurant concepts.

**[3]** The plaintiff did not agree with the proposed relocation and finally managed to secure the Albaik license. The plaintiff had on 4 January 2011 informed the defendant that the plaintiff wish to proceed with the fast food restaurant under Albaik concept at the said premises. However, the defendant on 7 January 2011 informed the plaintiff that the said premises had been open for public rental since 13 December 2010. The defendant later proposed that the fast food restaurant under Albaik concept be relocated.

**[4]** Therefore, the plaintiff withdraw from the tenancy via letter dated 28 March 2011 from renting the said lots and demanded that the deposit be returned. The plaintiff subsequent wrote letters dated 15 April 2011 and 19 May 2011 demanding the deposit to be refunded. The defendant had failed to refund the deposit, thereby causing plaintiff to commence proceeding against the defendant. However, the defendant refused and stated in the letter dated 25 May 2011 that the letter of offer provides that the landlord has the absolute right to forfeit the deposit as a result of tenant's withdrawal.

**[5]** Be that as it may, the defendant has finally agreed to return the deposit. However, the plaintiff had returned the money to the defendant, and later commenced legal action against the defendant, claiming for the refund of the deposit with interest, general damages and loss of profit.

**[6]** There are two applications pending before this court:

(a) summons in chambers (encl 5) — the defendant's application to strike out the plaintiff's claim, supported by affidavit affirmed by Wong Sue May (encl 6). The plaintiff's affidavit in reply was filed on 3 April 2012 (encl 8); and

(b) summons in chambers (encl 7) — the plaintiff's application to strike out defendant's counterclaim.

## THE LAW ON O 18 OF THE RULES OF THE HIGH COURT 1980

**[7]** In the case of *Dato' Seri Anwar Ibrahim v Perdana Menteri Malaysia & Anor* [2010] 3 MLJ 174; [2010] 5 CLJ 369, the Federal Court at p 184 (MLJ); p 381 (CLJ) stated as follows:

> Again, the Federal Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36 at p 43; [1993] 4 CLJ 7 at p 11 echoed the same sentiment in the following words:
>
> > The principle upon which the courts act in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'.
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> The Federal Court further stated that:
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> The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defenses raised are not arguable.
>
> Thus the main issue for consideration before us is whether the appellant's claim is obviously unsustainable.

## FINDINGS FOR ENCL 5

**[8]** Clause 25 of the letter of offer provides as follows:

> 25 Relocation of Demised Premise(s): Landlord reserves the right to relocate the demised premised (s). Tenants reserves the right to decline the relocated demised premise (s) and shall receive refund of deposit paid.

**[9]** The defendant contended that the refund of the deposit was done out of

good will, and according to the letter of offer, the defendant is entitle to forfeit the deposit in the event of the plaintiff's withdrawal. Clause 13 of the letter of offer states:

> It is a condition of this offer and acceptance that the Agreement be executed by the Tenant not later than the Handover of Demised Premises failing which, the offer and acceptance will lapse and be null and void. The Landlord is then entitled to forfeit the deposit paid herein.

**[10]** I find the defendant's contention unsustainable. Clause 13 clearly provides that the landlord (defendant) is only entitled to forfeit the deposit in the event the tenant (plaintiff) failed to execute the agreement before the handover. Clause 13 does not provide any other conditions that entitled the landlord (defendant) to forfeit the deposit. Furthermore, cl 11(b) of Schedule A of the letter of offer provides that handover date is to be specified via a notice issued by the landlord (defendant). In the present case, there was no notice issued by the landlord (defendant) regarding the handover date.

**[11]** Clause 25 of the letter of offer provides that the landlord (defendant) reserves the right to relocate the demised premised(s). The defendant had relied on this clause to justify their proposed relocation to the plaintiff.

**[12]** However, the same clause also provides that the tenant (plaintiff) reserves the right to decline the relocated demised premises(s), and in the event that the proposed relocation is declined, the tenant (plaintiff) shall be entitled to a refund of the deposit.

**[13]** Therefore, the plaintiff has every right to demand for the refund and the initial refusal of the defendant to refund the deposit was clearly inconsistent with the letter of offer. Furthermore, the tenant's trade in the letter of offer provides strictly for a fast food restaurant under Albaik concept only. It is unfair on the part of the defendant to later disapprove the said concept after the plaintiff has work hard to secure the license from Middle East. The wordings in the letter of offer are clear and the court should give effect to the intention of the parties by referring to the words used within the four corner of the agreement only.

**[14]** Be that as it may, it is my judgment that the plaintiff's claim is frivolous. The plaintiff had via its solicitor issue a notice of demand dated 23 September 2011 claiming the refund of the deposit. If the defendant failed to refund the deposit within seven days from the date of the notice, the plaintiff will commence legal action to recover the same. There is no mention at all in the letter and all other letters issued by the plaintiff that the plaintiff had suffered loss of profit due to the defendant's proposed relocation and the plaintiff intend

to claim for the losses suffered. The matter should be put to an end when the defendant refunded the deposit on 28 October 2011.

**[15]** Therefore, based upon the above reasons, it is in my judgment that the plaintiff's claim should be strike out with cost of RM2,000 (proposed). However, the court should also order that the deposit be refunded to the plaintiff, with interest from 1 October 2011 to 28 October 2011.

FINDINGS FOR ENCL 7

**[16]** This is an application made pursuant to O 18 r 19(1)(a) of the RHC 1980 to strike out the defendant's counterclaim, and no affidavit evidence will be put forth. The court is only required to consider the plidings.

**[17]** In the counterclaim, the defendant claimed that the plaintiff's claim was prejudicial and had caused loss of reputation. It is the defendant's contention that the plaintiff's action amounted to malicious prosecution. Upon the careful perusal of the relevant cause papers, I am off the view that there was no reasonable cause for defendant's counterclaim.

**[18]** Therefore, the defendant's counterclaim is strike out with cost of RM2,000 (proposed).

*Plaintiff's claim and defendant's counterclaim struck out with costs.*

Reported by Kohila Nesan